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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION

IN RE: TOLL ROADS LITIGATION

PENNY DAVIDI BORSUK; DAVID COULTER; EBRAHIM E. MAHDA; TODD QUARLES; TODD CARPENTER; LORI MYERS; DAN GOLKA; and JAMES WATKINS on behalf of themselves and all others similarly situated,

Plaintiffs,

VS.

FOOTHILL/EASTERN
TRANSPORTATION CORRIDOR
AGENCY; SAN JOAQUIN HILLS
TRANSPORTATION CORRIDOR
AGENCY; ORANGE COUNTY
TRANSPORTATION AUTHORITY;
3M COMPANY; BRiC-TPS LLC;
RHONDA REARDON; MICHAEL
KRAMAN; CRAIG YOUNG; SCOTT
SCHOEFFEL; ROSS CHUN;
DARRELL JOHNSON; LORI
DONCHAK; COFIROUTE USA, LLC;
and DOES 3-10; inclusive

Defendants

Case No: 8:16-cv-00262-ODW(ADSx)

Hon. Otis D. Wright II

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' UNOPPOSED
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Date: December 10, 2020

Time: 10:30 a.m.

Location: Judicate West

55 Park Plaza, Suite 400
Irvine, CA 92614

Special Master: Hon. Andrew J. Guilford (ret.)

[Filed Concurrently with Declarations and Proposed Order]

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

After five years of contentious litigation, Plaintiffs are pleased to announce that they have reached agreements with the Settling Defendants¹ to resolve all claims and end the litigation. In this motion, Plaintiffs seek preliminary approval of two outstanding class settlements, which they believe are fair, reasonable and adequate, as described in more detail below.²

This litigation concerns Plaintiffs' claim – and the claims of the certified Class of toll road drivers on State Routes 73, 133, 241, 261, and the 91 Express Lanes that Plaintiffs represent – that defendants improperly share their personally identifiable information ("PII") with third parties in violation of Streets and Highways Code § 31490, as well as several other consumer, constitutional and common law claims. Plaintiffs' claims have been vigorously prosecuted by their counsel and aggressively challenged by the five defendants in this action. Agreements to settle were reached only after multiple extensive and lengthy arms' length negotiations over a period of more than a year.

The two class settlements provide significant and meaningful relief to their respective classes: the total monetary value of the settlements is at least \$175.95 million, consisting of cash (non-reversionary funds of \$29 million from the TCA and \$11.95 million from 3M) as well as penalty forgiveness (\$135 million from the TCA).

¹ Defendants Foothill/Eastern Transportation Corridor Agency, San Joaquin Hills Transportation Corridor Agency, Michael Kraman, Craig Young, Scott Schoeffel, Ross Chun, Rhonda Reardon (collectively “TCA”) and BRiC-TPS, LLC (“BRiC”) are referred to collectively herein as “TCA Defendants”. The TCA Defendants and 3M Company (“3M”) are collectively referred to herein as “Settling Defendants” or “Defendants”. Plaintiffs are in the process of finalizing a negotiated settlement with the remaining Defendants (Orange County Transportation Authority (“OCTA”), Cofiroute USA, LLC, Darrell Johnson and Lori Donchak). Those defendants are not the subject of this Motion.

² There are two settlement agreements because the settlements were reached separately. Plaintiffs reached settlements in principle with: 3M on July 16, 2019 and the TCA Defendants on August 22, 2019. However, to avoid confusing Settlement Class members, the parties have endeavored to coordinate approval and notice.

1 The TCA settlement also provides important injunctive and programmatic relief
2 relating to, among other things, how TCA will safeguard driver's PII going forward.
3 For example, the TCA will provide, among other things: a one-time reset of all class
4 members' status to "opt-out" of advertising; substantive programmatic changes to the
5 TCA's practices going forward including increased disclosures in their privacy policy
6 about where consumers' PII is sent; limits on the PII sent to third parties to only that
7 information that is in the Notice of Violation or that is required by the state entity (*e.g.*,
8 the DMV or FTB); and an increase in the grace period by which all drivers have to
9 pay their tolls from five days to seven days.

10 These settlements were only achieved after five years of hard-fought litigation
11 which included multiple Motions to Dismiss, Motions for Judgment on the Pleadings,
12 three rounds of Motions for Summary Judgment, Class Certification, a 23(f) petition
13 to the Ninth Circuit (which denied the petition), a Motion to Decide Key Questions,
14 production and review of over 500,000 pages of documents, 34 depositions, expert
15 discovery, contested discovery disputes, and third party depositions across the
16 country. The settlement negotiations were just as intense and hard-fought, including
17 three rounds of good faith, arms'-length mediation before two highly respected
18 mediators, including one session that started at 9:00 a.m. and ended at 4:30 a.m. the
19 following morning (and ultimately resulted in a settlement in principle with the TCA
20 Defendants). The history of the litigation is described in more detail in the Declaration
21 of Helen I. Zeldes ("Zeldes Decl."), one of the three Co-Lead Class Counsel, filed
22 concurrently with this Memorandum.

23 The TCA Settlement Class is comprised of individuals whose PII was shared
24 during the complete Class Period, while the 3M Settlement Class covers individuals
25 whose PII was shared during the sub-portion of the Class Period when 3M was the
26 contracted vendor for the TCA (a subset of the TCA Settlement Class). All 3M
27 Settlement Class members are also TCA Settlement Class members and will be
28 eligible to receive relief from both settlements.

1 Class Counsel believe that the Settlement amounts reached here are an excellent
2 result for the Settlement Classes, particularly given the risks attendant to further
3 litigation. The settlements provide meaningful monetary, programmatic and
4 injunctive relief. In particular, in light of the valuable benefits conveyed to members
5 of the Settlement Classes, and the significant risks the Settlement Classes would face
6 if the litigation continued - including taking into account the Court's recent order on
7 Key Legal Questions dismissing some of Plaintiffs' claims during the settlement
8 process - the terms of the Settlement are "fair, reasonable, and adequate" and merit
9 preliminary approval. Class Counsel therefore respectfully request that this Court
10 grant preliminary approval of the Settlements.

11 **II. BACKGROUND AND PROCEDURAL HISTORY**

12 **A. The Complaint**

13 This action was initially filed in California state court on or about October 2,
14 2015, and later removed to federal court on February 16, 2016. Two additional federal
15 actions were filed and eventually consolidated into the current litigation in 2016. The
16 TCA filed Motions to Dismiss that were granted in part and denied in part on
17 December 20, 2016. Plaintiffs amended the operative Complaint on January 19, 2017,
18 and Defendants answered that Complaint on February 14, 2017

19 Plaintiffs' Complaint brought a claim under Streets and Highways Code §
20 31490 (the only cause of action to which class certification was granted) which alleged
21 that Defendants improperly provided PII of users and subscribers of the Toll Roads
22 (including Plaintiffs) to dozens of third parties in violation of § 31490(a), subjecting
23 them to statutory damages of \$2,500 per violation under § 31490(q). Plaintiffs also
24 alleged that Defendants violated other laws and statutes, including an excessive fines
25 claim (stemming from penalties they imposed), a due process claim (stemming from
26 their violation notices, administrative review procedures and lack of signage) as well
27 as several other claims.

28

1 **B. Discovery**

2 The parties engaged in extensive discovery and motion practice, including the
3 production of and review of over 500,000 pages of documents, depositions of 34
4 witnesses, expert discovery, and a site inspection of TCA's VTX System. *See* Zeldes
5 Decl. at ¶ 8. Discovery took place over the course of 40 months, with multiple motions
6 filed and fully litigated during that time. *Id.* Third party subpoenas were issued to 15
7 parties, and depositions of those third parties were also undertaken. *Id.*

8 **C. Class Certification**

9 Plaintiffs' Motion for Class Certification was filed on April 27, 2018 and fully
10 briefed over the course of the next two months, leading to a full class certification
11 hearing on July 31, 2018. *Id.* at ¶ 11. The Court certified Plaintiffs' proposed Privacy
12 Class and amended the class definition a few months later, but declined to certify any
13 other claims. Dkt Nos. 439, 501. Defendants filed a motion for reconsideration, which
14 the Court denied, and then filed an appeal to the Ninth Circuit, which was also denied
15 in April of 2019.

16 **D. Judgment on the Pleadings**

17 Defendants filed Motions for Judgment on the Pleadings on March 24, 2017.
18 After extensive briefing and oral argument, the Court granted in part and denied in
19 part each motion on August 2, 2017. Dkt. 204. The Court dismissed Plaintiffs'
20 Rosenthal Act claim and also dismissed Plaintiffs' claims against 3M for damages
21 under the California Constitution. The parties continued with discovery on Plaintiffs'
22 § 31490, negligence, constitutional privacy, due process and excessive fines claims.

23 **E. Summary Judgment**

24 Defendants sought summary judgment on multiple occasions, requiring
25 extensive briefing each time, and sought reconsideration after the Court ruled. Zeldes
26 Decl. at ¶ 12. Motions for partial summary judgment were first filed in March of 2017,
27 but later withdrawn, only to be renewed in September of 2017. At issue in the
28 summary judgment motions were Plaintiffs' claims under § 31490, which, over time,

1 became the focus of the litigation.

2 On January 12, 2018, the Court granted summary judgment on the portion of
3 Plaintiffs' claim based on alleged violations of the privacy policy but denied the
4 motion without prejudice as to the rest of Plaintiffs' claim for improper sharing of PII.
5 Dkt. 297. Discovery continued on the remainder of the claims.

6 Defendants' Third Motions for Summary Judgment were filed on June 18,
7 2018. On July 31, 2018, Plaintiffs' CLRA, UCL, and constitutional claims and
8 request for injunctive relief against 3M were dismissed. Dkt. 440. The excessive fines
9 claim against TCA was dismissed, but the individual due process claim survived.
10 Almost immediately after the Court ruled on the summary judgment motions,
11 Defendants filed extensive motions for reconsideration. The Court's tentative ruling
12 denied those motions and after argument on those motions in late September of 2018,
13 were taken under submission.

14 **F. Ruling on Key Questions**

15 Over the course of the litigation, Defendants suggested to the Court that, with
16 respect to certain issues in the case, concerning elements of the § 31490 claim,
17 resolution of particular "key questions" would help to resolve the matter. Defendants
18 ultimately filed their motion on June 10, 2019, and the parties briefed the motion, but
19 the Court withheld its ruling on the matter for several months, which provided an
20 impetus for settlement negotiations, leading ultimately to the 3M settlement in July
21 2019, followed by the TCA settlement in August 2019.

22 On January 17, 2020, the Court issued its ruling on the Key Questions Motion.
23 In its ruling, the Court found that certain types of transmissions for interoperability
24 and/or collection and enforcement did not violate Section 31490. [Dkt. No. 566] With
25 respect to intrastate interoperability, the Court found that Section 31490 permits
26 Defendants to send to another transportation agency the information established for
27 interoperability under subsection (a) of section 27565 of the Streets and Highways
28 Code, including, but not limited to, the date and time, toll plaza, and lane of that other

1 agency's accountholder's use of its toll road. The Court additionally found that certain
2 other transmissions for collection and enforcement purposes, such as transmissions of
3 information to the DMV or vendors to identify the registered owner and address or to
4 car rental companies, did not violate Section 31490. The Court found that providing
5 information to a third party collection agency to collect unpaid delinquent tolls and
6 penalties was permitted by Section 31490 but insufficient information had been
7 presented to show whether or not the information provided was required for
8 enforcement and collection purposes. With respect to certain other transmissions, the
9 Court found that it was unable to make a ruling due to unresolved factual issues.

10 **G. The Parties' Extensive Mediation Efforts**

11 On February 25, 2019, Plaintiffs and all defendants participated in a mediation
12 with Robert Kaplan. Hard fought, intensive and arms' length negotiations over the
13 course of a full day did not result in a settlement. On April 25, 2019, Plaintiffs and
14 3M participated in a second mediation with Mr. Kaplan. The parties made progress
15 toward a resolution and agreed to continue settlement discussions with the assistance
16 of Mr. Kaplan. Over the course of the next three months, involving multiple arms'
17 length communications and further negotiations between and among the parties and
18 Mr. Kaplan, the parties reached a settlement in principle on July 16, 2019. *See* Zeldes
19 Decl. at ¶ 13. On August 21, 2019, Plaintiffs and the TCA Defendants participated in
20 a mediation with Rachel Ehrlich, which lasted for 19 hours concluding at 4:30 a.m. in
21 the morning. *Id.* at ¶ 14. The mediation resulted in a settlement in principle with the
22 signing of a term sheet. Over the course of the next several months, Plaintiffs and the
23 TCA Defendants spent considerable time with the assistance of Ms. Ehrlich working
24 out the details of the Settlement Agreement. *Id.*

25 **H. Board Approval of the TCA Settlement**

26 The TCA settlement was subject to the approval of the boards that oversee their
27 operations, and was put to a vote of the boards following the conclusion of the
28 mediation efforts described above. The settlement was approved by the TCA boards.

1 **III. TERMS OF THE SETTLEMENT AGREEMENTS**

2 **The TCA Settlement**

3 **A. The TCA Settlement Class Definition**

4 The proposed TCA Settlement Class is defined as follows:

- 5 • All individuals whose PII was provided by Defendants to any other
6 individual or entity between April 13, 2015 and the Settlement Class
7 Period End Date³, except as otherwise specified. The Settlement Class
8 consists of:
 - 9 • Any person with a transponder account with a Toll Agency whose PII
10 was sent by Defendants to another Toll Agency between April 13, 2015
11 and the Settlement Class Period End Date (The “Interoperability
12 Subclass”);
 - 13 • Any person who used any of the TCA Toll Roads whose PII was sent by
14 Defendants to a third party between April 13, 2015 and the Settlement
15 Class Period End Date in connection with TCA Defendants’ efforts to
16 collect tolls and/or penalties (the “Collection/Enforcement Subclass”);
17 and
 - 18 • Any person whose PII was sent by Defendants to a third party between
19 April 13, 2015 and the Settlement Class Period End Date for any reason
20 other than those listed above (the “Communications Subclass”).

21 Excluded from the Settlement Class are: (1) employees of TCA Defendants, including
22 their current and former directors, officers and counsel; (2) any entity that has a
23 controlling interest in TCA Defendants; (3) TCA Defendants’ affiliates and
24 subsidiaries; and (4) the judge to whom this case is or was assigned, any member of
25 the judge’s immediate family, and any member of the judge’s staff.

26

27 ³ Settlement Class Period End Date is defined as thirty (30) days after the Court issues
28 the Preliminary Approval Order.

1 **B. The Settlement Benefits**

2 The total TCA settlement includes \$29 million dollars in cash, \$135 million
3 dollars in penalty forgiveness and substantial injunctive and programmatic relief
4 (changes to the TCA's practices). Specifically, the TCA settlement provides:

5 **1. Cash Payments to Class Members**

6 The TCA will contribute \$29 million dollars to a non-reversionary cash
7 Settlement Fund. All Settlement Class Members who submit valid Claim Forms and
8 are not eligible for penalty forgiveness will receive Cash Awards from the TCA
9 Settlement Fund on a pro-rata basis⁴.

10 **2. Penalty Forgiveness to TCA Class Members**

11 The TCA will also provide a substantial \$135 million dollars in penalty
12 forgiveness to Settlement Class Members with outstanding penalties. The Penalty
13 Forgiveness amount will be distributed in two steps: First, all Participating Penalty
14 Forgiveness Class Members will receive the lesser of the total of their outstanding
15 penalties or \$57.50 (the equivalent of at least one penalty assessment) in penalty
16 forgiveness. Second, the remainder of the Penalty Forgiveness Fund will be
17 distributed to Penalty Forgiveness Class Members from those with the oldest
18 outstanding penalties to the newest. There is no requirement to submit a Claim Form
19 to receive penalty forgiveness, it will be electronically pushed out to Penalty
20 Forgiveness Class Members.

21 **3. Remedial Measures Attributable to the Settlement**

22 In addition to the cash and penalty forgiveness, additional benefits of the
23 Settlement are the remedial measures that the TCA will enact as a result of this
24 litigation, which will benefit all Class Members regardless of whether they submit a
25 claim. The remedial measures include, but are not limited to:

26 ⁴The Settlement provides that unconfirmed claims will receive half of a pro rata share.
27 An unconfirmed claim is a claim submitted attesting to membership in the Settlement
28 Class but whose identifying information does not allow the Class Administrator to either confirm or reject membership in the Settlement Class.

a. Increasing the TCA's Grace Period from Five to Seven Days to Pay Tolls

The TCA has agreed to increase the time that drivers have to pay their tolls before a Notice of Toll Evasion is issued from 5 days to 7 days (a 40% increase in the grace period).

b. Editing the TCA's Privacy Policy to Provide More Information about Third Party Transmissions of PII

The TCA has agreed to change their privacy policy to include a list of the categories of PII sent to any third party, including but not limited to entities that belong to the California Toll Operators Committee (“CTOC”), and a separate list of the categories of PII the TCA receives from other Toll Agencies.

c. Reset ALL TCA Advertising Opt-Ins to Opt-Out

The TCA will remove the opt-in status all for all current subscribers in the VTX system (governing opt-ins for communications by TCA) if the Court approves that they can send (i) a single email to all account holders notifying them that they have been opted out and asking them to select their communications preferences in their online account; and (ii) a statement to be included in any other communications that would otherwise be sent to TCA customers advising them to update their communications preferences and/or containing a link to a website that allows TCA customers to update their communications preferences.

d. Limitations on the TCA's PII Transmissions Going Forward

The TCA has agreed on a going forward basis to the following limitations on its PII transmissions:

- When the TCA sends PII to the Franchise Tax Board (“FTB”) for the purpose of placing a tax intercept, the TCA will send only the PII that the FTB requires to place such tax intercept.

2. When the TCA transmits PII to a rental car company as a result of a rental car traveling on State Routes 73, 133, 241, or 261 and failing to pay a toll associated with travel on such Route, the TCA will transmit only such PII as is contained in the toll violation notice resulting from the aforementioned failure to pay a toll.
 3. The TCA shall use skip tracers only in instances where: (i) mail is returned to the TCA as undeliverable, or (ii) the TCA requires the use of skip tracers to obtain information that the FTB requires to place a tax intercept. Notwithstanding the foregoing, if legislation is enacted that provides for the use of skip tracers in additional instances, the TCA shall also be permitted to use skip tracers in those additional instances.
 4. When the TCA sends PII to the California Department of Motor Vehicles (“DMV”) for the purpose of causing the DMV to place a DMV registration hold, the TCA shall only send the PII that the DMV requires to place a DMV registration hold.

e. **Miscellaneous Remedial Measures**

Since the filing of this lawsuit, the TCA has undertaken significant signage enhancement projects, including, in the spring of 2019, sign enhancements along the 73, 133, 241, and 261 and, in 2020, updating and modifying nearly 600 roadway signs on the 73, 133, 241, and 261 Toll Roads, including connecting highways and arterials. The TCA has also provided significant revisions and improvements to its privacy policy to now disclose its current collection, and sharing PII practices. See https://thetollroads.com/sites/default/files/Privacy_Policy_01_01_2020.pdf (last visited October 28, 2020).

4. The TCA Settlement's Value to Class Members

The total cash fund that will be distributed to Settlement Class Members (after class notice and administration costs, cost of a Special Master, Class Counsel's attorneys' fees and reasonable costs and Service Awards to the Class Representatives)

1 is \$29 million dollars. The total penalty forgiveness is \$135 million dollars. The total
2 monetary value of the TCA settlement is thus approximately \$164 million. The value
3 of remedial measures for consumers is not included in these numbers, but is clearly of
4 significant meaningful value to drivers on the toll roads.

5 **C. Plan of Distribution to the TCA Settlement Class**

6 Subject to the Court's approval, the \$29 million cash will be used to fund the
7 Cash Awards, class notice and administration costs, cost of a Special Master, Class
8 Counsel's attorneys' fees and reasonable costs and Service Awards to the Class
9 Representatives. Class members will claim in for cash. Penalty Forgiveness will be
10 automatically allocated to class members, no claim process will be necessary. As
11 discussed above, the TCA will electronically forgive outstanding penalties in two
12 steps: first, TCA will forgive the lesser of the Settlement Class Member's total
13 outstanding penalties or \$57.50 (the equivalent of one penalty). Secondly, TCA will
14 forgive up to 100% of the Settlement Class's remaining outstanding penalties, starting
15 with the Settlement Class's oldest penalties and proceeding to the newest. This is the
16 way to get the most penalty forgiveness for the Class and will help get relief to class
17 members who have been unable to renew their vehicle registrations the longest due to
18 DMV liens as well as to those who have been subjected to FTB liens.

19 **D. Notice to the TCA Class**

20 Pursuant to Rule 23(c)(2)(B), the Settlement Administrator will provide Class
21 Members with the Settlement Notice via U.S. Mail or email to each Class Member's
22 last known address. (Settlement Agreement ¶8.01; Declaration of Cameron Azari of
23 Epiq Class Action & Claims Solutions, Inc. ("Azari Decl.") ¶¶ 6-7. The printed
24 Settlement Notice will contain a detachable Claim Form allowing participating Class
25 Members to claim in for a cash distribution. The printed Settlement Notice will also
26 list the website where Class Members may electronically submit a claim form. Class
27 Members who receive Settlement Notice by email will receive a link in the email that
28 will take them directly to the easy-to-submit Settlement Website online claim form.

1 For those who are members of both the TCA and 3M Settlement Classes, the Notice
2 will include both the TCA and 3M Settlements so that a Class Member only needs to
3 submit one claim form to be considered for cash payments from both Settlements. In
4 addition, publication notice will also be utilized to reach the small portion of the class
5 for whom the TCA does not have their contact information.

6 **E. Proposed TCA Class Representative Service Awards**

7 Subject to Court approval, Class Counsel will seek payment of up to \$15,000
8 service awards to each Plaintiff for their service as Class Representatives.⁵ (Settlement
9 Agreement ¶ 4.02). These Plaintiffs have been enthusiastic and active class
10 representatives. They have actively participated in the prosecution of this action by:
11 reviewing and approving their original complaints and the Consolidated Complaint;
12 sitting for a full-day deposition; responding to multiple lengthy sets of written
13 discovery including ones that delved into their finances; communicating regularly
14 with class counsel; submitting declarations in opposition to Defendants' motions for
15 summary adjudication; and generally staying informed about the progress of the
16 litigation and acting in the interests of the proposed classes. Each put their name and
17 reputation on the line for the sake of the Class, and no recovery would have been
18 possible without their critical role. Zeldes Decl. ¶ 30. The proposed maximum
19 \$15,000 service awards are consistent with those approved in other consumer class
20 action settlements that have been pending as long as this one has.

21 **F. Attorneys' Fees and Costs**

22 As part of the TCA Settlement, Class Counsel stated that they would not seek
23 an award of fees in excess of one-third of the Settlement Value (Settlement Agreement
24 ¶ 4.01). The Settlement Value of the monetary component of the settlement is \$164
25 million, which includes cash and monetary forgiveness. Class Counsel will seek no
26 more than \$17.5 million – less than a third of the maximum amount that Class Counsel
27

28 ⁵ Plaintiff James Watkins is not a party to either Settlement Agreement.

1 stated they would seek pursuant to Settlement Agreement. This amount represents
2 10.7% of the minimum estimated Settlement Value. Such a request is well below the
3 Ninth Circuit's 25% "benchmark" percentage for such awards. *See, e.g., Deluca v.*
4 *Farmers Insurance Exchange*, 2020 WL 5071700 (N.D. Cal. August 24, 2020);
5 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002); *In re Online*
6 *DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015); *see also Schulein v.*
7 *Petroleum Dev. Corp.*, No. SACV 11-1891 AG (ANX), 2015 WL 12698312, at *6
8 (C.D. Cal. Mar. 16, 2015) (30% of the settlement is "certainly not unique, especially
9 in common fund cases" and "is similar to awards in other cases, which favors granting
10 the motion."). Nonetheless, an upward adjustment above the benchmark percentage
11 would have been warranted under these circumstances.

12 The Proposed Order for preliminary approval provides that Class Counsel will
13 file a motion for payment of attorneys' fees and expenses prior to the Final Fairness
14 Hearing. As that motion will make clear, the \$17.5 million sought is reasonable as a
15 percentage of the fund and is also commensurate with the substantial lodestar
16 attorneys' fees plus expenses incurred in this matter. Class Members will have the
17 opportunity to comment on or object to the fee petition under Rule 23(h), consistent
18 with Ninth Circuit authority. *See Mercury Interactive Corp. Sec. Litig. v. Mercury*
19 *Interactive Corp.*, 618 F.3d 988, 993-94 (9th Cir. 2010).

20 **G. The Settlement Administrator**

21 The Parties propose that Epiq Class Action & Claims Solutions, Inc.—an
22 experienced and reputable national class action administrator—serve as Settlement
23 Administrator to provide notice; administer and make determinations regarding claim
24 forms; process settlement payments; make distributions; and provide other services
25 necessary to implement the Settlement. (Settlement Agreement ¶¶ 6.01, 6.03, 7.01,
26 7.02, 8.01, 8.02, 8.04, 8.05, 8.06.) The costs of the Settlement Administrator will be
27
28

1 paid out of the Settlement Fund, which costs are estimated to be \$1,648,346.94⁶
2 (Settlement Agreement, ¶ 12.01(a)).

3 **THE 3M SETTLEMENT**

4 **A. The 3M Settlement Class Definition**

5 The proposed 3M Settlement Class is a subset of the TCA Settlement Class (the
6 same class, just for a shorter period of time) and is defined as follows:

7 All individuals whose PII was provided by 3M or TCA to any other individual
8 or entity from April 13, 2015 to June 30, 2015, including:

- 9 • Any person with a transponder account with a Toll Agency whose PII
10 was sent by 3M or TCA from April 13, 2015 to June 30, 2015 to another
11 Toll Agency (interoperability transmissions);
- 12 • Any person who used any of the TCA Toll Roads whose PII was sent by
13 3M or TCA to a third party from April 13, 2015 to June 30, 2015 in
14 connection with efforts to collect tolls or penalties (collection
15 transmissions); and
- 16 • Any person whose PII was sent by 3M or TCA to a third party from April
17 13, 2015 to June 30, 2015 for any reason other than those listed above
18 (other transmissions).

19 Excluded from the Settlement Class are: (1) employees of Defendant, including their
20 current and former directors, officers and counsel; (2) any entity that has a controlling
21 interest in Defendant; (3) Defendant's affiliates and subsidiaries; and (4) the judge to
22 whom this case is assigned, any member of the judge's immediate family, and any
23 member of the judge's staff.

24 **B. The 3M Settlement Benefits**

25 The total 3M settlement includes \$11.95 million dollars in cash. Specifically,
26 the 3M settlement provides:

27
28

⁶The costs of the Settlement Administrator will be apportioned equitably between the
two Settlements.

1 **1. Cash Payments to 3M Class Members**

2 Defendant 3M Company will contribute \$11.95 million dollars to a non-
3 reversionary Settlement Fund. All Class Members who submit a valid Claim Form
4 will be eligible to receive a cash payment on a pro rata basis⁷.

5 **C. Plan of Distribution to the 3M Settlement Class**

6 Subject to the Court's approval, the \$11.95 million cash will be used to fund
7 the Cash Awards, class notice and administration costs, cost of a Special Master, Class
8 Counsel's attorneys' fees and reasonable costs and Service Awards to the Class
9 Representatives. 3M Class members will submit claims for eligibility for a pro rata
10 share of the cash fund (the total fund, minus costs, divided by the total number of
11 claims) as set forth in the attached Class Notice Plan. If there are any remaining funds
12 after the initial distribution, a second round of checks will also be allocated on a pro
13 rata basis to the claimants who have cashed their settlement checks.

14 **D. Notice to the 3M Settlement Class**

15 As described above, 3M Class Members will receive a single notice describing
16 both the TCA Class Settlement and the 3M Class Settlement and allowing them to
17 make claims in either or both settlements.

18 **E. Proposed 3M Class Representative Service Awards**

19 Subject to Court approval, Defendant 3M agrees not to oppose the payment of
20 \$3,000 service awards to each settling Plaintiff (excluding Quarles and Mahda, whose
21 claims against 3M were dismissed) for their service as Class Representatives. (3M
22 Settlement Agreement ¶ 5.02). These Plaintiffs have been enthusiastic and active class
23 representatives. They have actively participated in the prosecution of this action by:
24 reviewing and approving their original complaints and the Consolidated Complaint;

25
26

⁷ The Settlement provides that unconfirmed claims will receive half of a pro rata share.
27 An unconfirmed claim is a claim submitted attesting to membership in the Settlement
28 Class but whose identifying information does not allow the Class Administrator to
either confirm or reject membership in the Settlement Class.

1 sitting for a full-day deposition; responding to multiple lengthy sets of written
2 discovery including ones that delved into their finances; communicating regularly
3 with class counsel; submitting declarations in opposition to Defendants' motions for
4 summary adjudication; and generally staying informed about the progress of the
5 litigation and acting in the interests of the proposed classes. Each put their name and
6 reputation on the line for the sake of the Class, and no recovery would have been
7 possible without their critical role. Zeldes Decl. ¶30 The proposed \$3,000 service
8 awards are consistent with those approved in other consumer class action settlements
9 that have been pending as long as this one has.

10 **F. Attorneys' Fees and Costs**

11 As part of the Settlement, Class Counsel stated that they would not seek an
12 award of fees in excess of one-third of the Settlement Value. (3M Settlement
13 Agreement ¶ 5.01). The Settlement Value is \$11.95 million. Class Counsel will only
14 request 25% of the Settlement Value, which equals approximately \$2.99 million.
15 Such a request is consistent with the Ninth Circuit's 25% "benchmark" percentage for
16 such awards. *See, e.g., Deluca v. Farmers Insurance Exchange*, 2020 WL 5071700
17 (N.D. Cal. August 24, 2020); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50
18 (9th Cir. 2002); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir.
19 2015); *see also Schulein v. Petroleum Dev. Corp.*, No. SACV 11-1891 AG (ANX),
20 2015 WL 12698312, at *6 (C.D. Cal. Mar. 16, 2015) (30% of the settlement is
21 "certainly not unique, especially in common fund cases" and "is similar to awards in
22 other cases, which favors granting the motion.").

23 The Proposed Order for preliminary approval provides that Class Counsel will
24 file a motion for payment of attorneys' fees and expenses prior to the Final Fairness
25 Hearing. As that motion will make clear, the approximately \$2.99 million sought is
26 reasonable as a percentage of the fund and is also commensurate with the lodestar
27 attorneys' fees plus expenses incurred in this matter. Class Members will have the
28 opportunity to comment on or object to the fee petition under Rule 23(h), consistent

1 with Ninth Circuit authority. *See Mercury Interactive Corp. Sec. Litig. v. Mercury*
2 *Interactive Corp.*, 618 F.3d 988, 993-94 (9th Cir. 2010).

3 **G. The 3M Settlement Administrator**

4 The Parties propose that Epiq Class Action & Claims Solutions, Inc.—an
5 experienced and reputable national class action administrator—serve as Settlement
6 Administrator to provide notice; administer and make determinations regarding claim
7 forms; process settlement payments; make distributions; and provide other services
8 necessary to implement the Settlement. (Settlement Agreement ¶¶ 7.01, 7.02, 7.03,
9 8.01, 8.02, 8.04, 8.05.) The total costs of the Settlement Administrator for both the
10 TCA and 3M settlements⁸ will be paid out of the Settlement Funds of those settlements
11 and is estimated to be \$1,648,346.94.

12 **IV. PRELIMINARY APPROVAL IS APPROPRIATE**

13 **A. Legal Standards**

14 Federal Rules of Civil Procedure 23(e) governs a district court’s analysis of the
15 fairness of a proposed class action settlement. First, a court must determine that it is
16 likely to (i) approve the proposed settlement as fair, reasonable, and adequate, after
17 considering the factors outlined in Rule 23(e)(2), and (ii) certify the settlement class
18 for judgment. See Fed. R. Civ. P. 23(e)(1)(B). Second, a court must direct notice to
19 the proposed settlement class, describing the terms of the proposed settlement and the
20 definition of the proposed class, to give them an opportunity to object to or to opt out
21 of the proposed settlement. See Fed. R. Civ. P. 23(c)(2)(B); Fed. R. Civ. P. 23(e)(1),
22 (5). Third, after a hearing, the court may grant final approval of the proposed
23 settlement on a finding that the settlement is fair, reasonable, and adequate. Fed. R.
24 Civ. P. 23(e)(2).

25

26

27

⁸ The costs of the Settlement Administrator will be apportioned equitably between the two Settlements.

1 **1. Class Certification**

2 Parties seeking class certification for settlement purposes must satisfy the
3 requirements of FRCP 23. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).
4 A party seeking class certification must first demonstrate that: "(1) the class is so
5 numerous that joinder of all members is impracticable; (2) there are questions of law
6 or fact common to the class; (3) the claims or defenses of the representative parties
7 are typical of the claims or defenses of the class; and (4) the representative parties will
8 fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). "Second,
9 the proposed class must satisfy at least one of the three requirements listed in Rule
10 23(b)." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345, (2011). However, the court
11 does not need to consider issues of manageability, as manageability is not a concern
12 in certifying a settlement class where, by definition, there will be no trial. *In re*
13 *Hyundai and Kia Fuel Economy Litigation*, 926 F.3d 539, 556-57 (9th Cir. 2019).

14 **2. Fairness of the Proposed Class Action Settlement**

15 Rule 23 provides that "the claims, issues, or defenses of ... a class proposed to
16 be certified for purposes of settlement may be settled. . . only with the court's
17 approval." Fed. R. Civ. P. 23(e). "The primary concern of [Rule 23(e)] is the protection
18 of th[e] Class Members, including the named plaintiffs, whose rights may not have
19 been given due regard by the negotiating parties." *Officers for Justice v. Civil Service*
20 *Comm'n of the City & Cnty. of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982), cert.
21 denied, 459 U.S. 1217 (1983). Therefore, a district court must determine whether a
22 proposed class action settlement is "fundamentally fair, adequate, and reasonable."
23 *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003); see Fed. R. Civ. Proc. 23(e).
24 Whether to approve a class action settlement is "committed to the sound discretion of
25 the trial judge." *Class Plaintiffs. v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992),
26 cert. denied, *Hoffer v. City of Seattle*, 506 U.S. 953 (1992). The Court may approve a
27 settlement agreement "after a hearing and on finding that it is fair, reasonable, and
28 adequate." Fed. R. Civ. P. 23(e)(2).

1 “If the proposed settlement ‘appears to be the product of serious, informed,
2 noncollusive negotiations, has no obvious deficiencies, does not improperly grant
3 preferential treatment to class representatives or segments of the class, and falls within
4 the range of possible approval,’ the court should grant preliminary approval of the
5 class and direct notice of the proposed settlement to the class.” *Kenneth Glover, et al.*
6 *v. City of Laguna Beach, et al.*, 2018 WL 6131601, at *2 (C.D. Cal. 2018) (Guilford,
7 J.) (quoting *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079-80 (N.D.
8 Cal. 2007)).

9 **B. Discussion**

10 **1. Class Certification**

11 The Court has already certified a Privacy Class for litigation of the claims under
12 Streets and Highways code § 31490. *See* Dkt. 501 pp. 19-20. The proposed
13 settlements define Settlement Classes that are slightly different than the certified
14 Privacy Class. First, the 3M Settlement Class only covers the period of time between
15 April 13, 2015 and June 30, 2015 as 3M’s contract with the TCA ended on that date.
16 Second, membership in the certified Privacy Class is defined based on whether the
17 consumer used one of the toll roads during the Class Period. However, membership
18 in the Settlement Classes is defined based on whether the consumer’s PII was shared
19 during the Class Period. Plaintiffs believe that the sharing of PII is the relevant factor
20 as that is what triggers the application of SHC § 31490. Finally, the six bullet points
21 in the Class Certification Order are combined into three broader bullet points in the
22 Settlements.

23 At the Class Certification stage, Plaintiffs had moved to certify a broad class
24 consisting of consumers who had their privacy rights violated by the improper
25 dissemination of their PII in connection with the Toll Roads operated by the
26 Defendants Dkt. 501 p. 3-4. In finding that the class definition was fail-safe, the Court
27 used its discretion to redefine the class. *Id.* At 12-13. Using documents Plaintiffs
28 submitted with their briefing, the Court redefined the class as consumers who used the

1 Toll Roads and whose PII was shared with various identified third parties during the
2 class period. *Id.* at 19-20.

3 After Class Certification, the TCA identified additional third parties with whom
4 they shared PII. Therefore, in order to ensure the settlement includes all individuals
5 with whom Defendants shared PII, the Settlements encompass broader subclasses.
6 These subclasses do not suffer from the same problem as the broad fail-safe class the
7 court originally rejected, as membership in the Settlement subclasses is based on
8 whether the class member's PII was shared with the third party and not whether the
9 sharing was improper.

10 For the reasons outlined in the Court's order on Class Certification and as
11 further discussed below, the Settlement Classes should be certified as they meet the
12 requirements of FRCP 23(a) and 23(b)(3).

13 **a. The Classes are Sufficiently Numerous**

14 Rule 23(a)(1) requires that "the class is so numerous that joinder of all members
15 is impracticable." Fed. R. Civ. P. 23(a). "It's generally accepted that when a proposed
16 class has at least forty members, joinder is presumptively impracticable based on
17 numbers alone." Dkt. 501 at p.8 (citations omitted). Defendants estimate that, prior to
18 deduplication, there are approximately 1.5 million individuals in the 3M Settlement
19 Class and approximately 14 million individuals in the TCA Settlement Class,
20 therefore numerosity is satisfied.

21 **b. There are Common Questions of Law and Fact**

22 The commonality requirement is satisfied if "there are questions of law or fact
23 common to the class." Fed. R. Civ. P. 23(a)(2). As this Court found in certifying the
24 Privacy Class:

25 So long as there is even a single common question, a would-be class can
26 satisfy the commonality requirement of Rule 23(a)(2). Plaintiffs state in
27 broad terms several questions that are common to the class, including
28 whether Defendants violated privacy laws by sharing drivers' PII with

1 third parties. That's enough to satisfy Rule 23(a)(2).

2 *See* Dkt. 501 at p.8 (internal citations and quotations marks omitted) Here, the
3 Settlement Classes, while broader than the certified Privacy Class, involve the same
4 questions of law and fact. This includes whether Defendants violated privacy laws by
5 sharing Class Members' PII with third parties. The transmissions at issue were done
6 on a uniform basis based on Standard Operating Procedures ("SOPs"), automated
7 processes, and policies that ensure toll collection is executed in a uniform manner and
8 not on an individualized basis. Commonality is satisfied.⁹

9 **c. The Class Representatives' Claims Are Typical of Those
10 of Other Class Members**

11 Rule 23(a)(3) requires that the Class Representatives' claims be typical of those
12 of the Class. "The test of typicality is whether other members have the same or similar
13 injury, whether the action is based on conduct which is not unique to the named
14 plaintiffs, and whether other class members have been injured by the same course of
15 conduct." *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014) (internal quotation
16 marks omitted). "[R]epresentative claims are 'typical' if they are reasonably co-
17 extensive with those of absent class members; they need not be substantially
18 identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Here,
19 Plaintiffs' claims stem from Defendants' uniform practices of sharing PII. Plaintiffs
20 thus satisfy the typicality requirement of Rule 23(a)(3).

21 **d. Class Representatives and Class Counsel Adequately
22 Represent Class Members**

23 Rule 23(a)(4) permits certification of a class action only if "the representative

24
25 ⁹ Pursuant to the Settlement Agreements, Defendants have agreed not to contest class
26 certification solely for the purposes of settlement. Pursuant to the Settlement
27 Agreements, certification of the Settlement Classes will not be deemed a concession
28 that certification of a litigation class is appropriate, nor are Defendants precluded from
challenging class certification in further proceedings in this Litigation or in any other
action if the Settlement Agreements are not finalized or finally approved. TCA
Settlement Agreement, ¶ 3.01; 3M Settlement Agreement, ¶ 3.01.

1 parties will fairly and adequately protect the interests of the class. FRCP 23(a)(4).
2 Resolution of two questions determines legal adequacy: (1) do the named plaintiffs
3 and their counsel have any conflicts of interest with other class members and (2) will
4 the named plaintiffs and their counsel prosecute the action vigorously on behalf of the
5 class?" *Hanlon*, 150 F.3d at 1020.

6 Plaintiffs and their counsel are adequate. First, the proposed Settlement Class
7 Representatives and their Counsel do not have any conflicts of interest with the absent
8 Class Members. *See* Dkt. 501 p. 10. Second, as the Court has found, Plaintiffs and
9 Class Counsel have vigorously prosecuted the action on behalf of the Class for nearly
10 four years. *Id.* As detailed above, Class Counsel engaged in significant discovery. *See* *supra*, §II.B. Class Counsel defended against over twenty dispositive motions and
11 moved for and extensively litigated class certification issues. *See id.* The Settlement
12 Class Representatives were likewise actively engaged—each produced numerous
13 documents, sat for a lengthy deposition, and regularly communicated with counsel up
14 to and including evaluating and approving the proposed Settlement. *See* §II.B. Each
15 of them supported the terms of the settlement and have expressed their continued
16 willingness to protect the Class until the Settlements are approved and their
17 administration completed. *See* Zeldes Decl., ¶ 31. Thus, adequacy is satisfied.
18

19 **e. Common Issues of Law and Fact Predominate**

20 In addition to the requirements of Rule 23(a), at least one of the prongs of Rule
21 23(b) must be satisfied. Rule 23(b)(3) allows certification of a class if the Court finds
22 that "questions of law or fact common to class members predominate over any
23 questions affecting only individual members, and that a class action is superior to other
24 available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ.
25 P. 23(b)(3). "The predominance inquiry of Rule 23(b)(3) asks 'whether proposed
26 classes are sufficiently cohesive to warrant adjudication by representation.' " *In re*
27 *Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 957 (9th Cir. 2009)
28 (quoting *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas*

1 *Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001)). As this Court found, “Since
2 Plaintiffs seek to recover statutory damages for the class, the central issue of their §
3 31490 claim is determining what PII transfers violate § 31490 and what PII transfers
4 fall under an exception. And since Defendants make PII available according to
5 uniform policies, resolving that central issue can easily be done on a class-wide basis.
6 So common questions prominently predominate the § 31490 claim.” Dkt. 501 at p. 12.

f. Superior Method of Adjudication

Rule 23(b)(3) lists four factors relevant to the Court’s decision on whether a class action is superior to other forms of litigation: (1) the class members’ interests in individually controlling the litigation; (2) the extent and nature of any litigation concerning the controversy already begun by or against class members; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the likely difficulties in managing a class action. FRCP 23(b)(3). As this Court found, all four factors are met here. Dkt. 501 at P. 14

2. The Proposed Settlements Should be Preliminarily Approved

16 Rule 23(e)(2) identifies criteria for the Court to use in deciding whether to grant
17 preliminary approval of a proposed class settlement and direct notice to the proposed
18 class. The Class Settlements proposed here satisfy each criterion.

a. The Class Representatives and Class Counsel have adequately represented the Settlement Classes

21 As set forth in the Zeldes Decl., ¶¶ 23-31, Class Representatives and Class
22 Counsel have adequately represented the class.

b. The Proposals Were Negotiated At Arm's Length

24 As set forth above, Plaintiffs achieved the Settlements after five years of hard
25 fought, contested litigation and through extensive, hard fought, arm's-length
26 negotiations. Plaintiffs' counsel will be paid from the same non-reversionary
27 Settlement Funds as Class Members, such that Plaintiffs' counsel had every incentive
28 to secure the largest fund possible. There is no indication of collusion or fraud in the

1 settlement negotiations, and none exists.

2 **c. The Relief Provided for the Class Is Adequate**

3 The Settlements provide substantial Class relief, considering (i) the costs, risks,
4 and delay of trial and lengthy appeals; (ii) the effectiveness of the proposed
5 distribution plan; and (iii) the terms of the proposed award of attorney's fees. *See Fed.*
6 *R. Civ. P. 23(e)(2)(C).*

7 **i. The Costs, Risks, And Delay Of Trial and Appeal**

8 This factor overwhelmingly weighs in favor of preliminary approval of the
9 Settlements. The risk, expense, complexity, and likely duration of further litigation in
10 this Action is substantial. This case involves a matter of first impression: the analysis
11 of a novel state law. As evidenced in this case, there are many legal and factual issues
12 that were unclear. There was a substantial risk that the Court would rule in favor of
13 the Defendants. The Court's Order on the Motion to Decide Key Questions shows that
14 Plaintiffs face substantial risk on their claims going forward, as the Court ruled against
15 Plaintiffs on several key legal issues and dismissed several of Plaintiffs' claims under
16 § 31490. Even if the Court were to rule in favor of Plaintiffs on the remaining "Key
17 Questions" issues, Defendants have already indicated that they plan to appeal any such
18 ruling. Defendants have also repeatedly stated throughout this litigation that given the
19 statutory damages at issue in the case, if Plaintiffs were to prevail, it would bankrupt
20 them and there would be no money to go after at the end of the day. Furthermore,
21 since the amount of potential statutory damages in this case is substantial, Defendants
22 have indicated that if judgment were entered against them, they would appeal such a
23 judgment as a violation of due process, which may lead to the Court significantly
24 reducing the amount of damages. These risks are substantial. On the other hand, the
25 Settlements provide immediate significant relief to Class Members without the delay
26 of trial and appeal. Therefore, this factor strongly supports preliminary approval of
27 the Settlements.

28

ii. The Effectiveness of Any Proposed Method of Distributing Relief to the Class, Including the Method of Processing Class-Member Claims

As discussed in Sections III.B., *supra*, the penalty forgiveness will be provided to the TCA Settlement Class members automatically without them having to submit a claim. For those in the 3M settlement class and for those TCA class members who are not entitled to penalty forgiveness, they will need to submit a claim form which can be filled out online or mailed in. Those class members will receive cash payments on a pro-rata basis.

iii. The Terms of Any Proposed Award of Attorney's Fees, Including Timing of Payment

Attorneys' Fees are to be paid from the common funds after final approval in the amounts set forth in Section III, *supra*.

d. The Proposal Treats Class Members Equitably Relative to Each Other

In the 3M settlement, all class members whose inclusion in the class can be confirmed will receive pro rata shares of the net settlement fund and are therefore being treated equitably relative to each other. Claimants whose class membership can be neither confirmed or denied will receive half of a pro rata share: this is an equitable way to protect legitimate class members against fraudulent depletion of the fund, while recognizing the difficulty that some members will have in verifying their records.

The TCA settlement class members are also being treated equitably relative to each other. For those who are entitled to penalty forgiveness, at the minimum they are all receiving the lesser of their outstanding penalties or \$57.50 and are therefore receiving significant relief. After that, the remainder of the penalty forgiveness will be distributed to those class members starting with the oldest penalties first, thereby allowing those with older penalties, who are more likely to have been affected for a

1 longer period by the imposition of penalties and accompanying measures such as
2 DMV holds, to get the penalties waived and be on equal footing with those with only
3 recent penalties. Those who do not have outstanding penalties and whose class
4 membership can be confirmed will be receiving pro rata shares from the net settlement
5 fund, while those whose class membership can be neither confirmed nor denied will
6 receive half of a pro rata share.

7 Class Counsel intend to apply for service awards for the Settlement Class
8 Representatives. Service awards "are fairly typical in class action cases" and "are
9 intended to compensate class representatives for work done on behalf of the class, to
10 make up for financial or reputational risk undertaken in bringing the action, and,
11 sometimes, to recognize their willingness to act as a private attorney general."
12 *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009). A service award
13 is appropriate here and does not constitute preferential treatment. No Class
14 Representative was promised, nor conditioned their representation on the expectation
15 of a service award. *See* Zeldes Decl. ¶31. The Representatives have each spent
16 substantial time developing the case, conferring with counsel, answering multiple sets
17 of discovery requests, searching for and producing documents, and preparing and
18 testifying at their lengthy depositions (which delved in to details about their personal
19 and financial circumstances), over the past four years. *See, Id* ¶30. Given this
20 significant commitment, service awards are particularly appropriate.

21 **3. The Proposed Notice is Appropriate**

22 "The court must direct notice in a reasonable manner to all Class Members who
23 would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). Federal Rule of Civil
24 Procedure 23(c)(2) requires the Court to "direct to Class Members the best notice that
25 is practicable under the circumstances, including individual notice to all members who
26 can be identified through reasonable effort." The best practicable notice is that which
27 is "reasonably calculated, under all the circumstances, to apprise interested parties of
28

1 the pendency of the action and afford them an opportunity to present their objections."
2 *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

3 The amendments to Rule 23(c)(2)(B) provide that "notice may be by one or
4 more of the following: United States mail, electronic means, or other appropriate
5 means." The notice must state in plain, easily understood language: (i) the nature of
6 the action; (ii) the definition of the class certified; (iii) the class claims, issues, or
7 defenses; (iv) that a class member may enter an appearance through an attorney if the
8 member so desires; (v) that the court will exclude from the class any member who
9 requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the
10 binding effect of a class judgment on members under Rule 23(c)(3). Fed. R. Civ. P.
11 23(c)(2)(B).

12 For class members whose names and addresses cannot be reasonably
13 ascertained, "courts may use alternative means such as notice through third parties,
14 paid advertising, and/or posting in places frequented by class members, all without
15 offending due process." *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 665 (7th Cir.
16 2015), *cert. denied*, ___ U.S. ___, 136 S. Ct. 1161 (2016); *see also Lilly v. Jamba Juice*
17 *Co.*, 308 F.R.D. 231, 239 (N.D. Cal. 2014) (noting that "an extensive but targeted
18 internet and print media campaign . . . aimed at providing notice to other potential
19 class members," whose contact information was not on file, did not present due
20 process concerns). Moreover, courts have routinely approved notice via email. See,
21 e.g., *Spann v. J.C. Penney Corporation* (C.D. Cal. 2016) 314 F.R.D. 312, 331; *In re*
22 *HP Inkjet Printer Litigation*, 2014 WL 4949584 (N.D. Cal, Sep, 30, 2014); *Noll v.*
23 *eBay, Inc.*, 309 F.R.D. 593, 605 (N.D. Cal., September 15, 2015). Plaintiffs' Notice
24 Plan, set forth in more detail below, meets the requirements of Rule 23(c)(2)(B).

25 To provide efficiency and avoid confusing class members, the parties will
26 combine both settlements into one Notice and Notice Program. The parties have
27 developed a Notice Plan with Settlement Administrator – Epiq - that will include
28 direct mail or email notice to Settlement Class Members with known addresses,

1 designed to reach between 80-90% of identifiable Settlement Class members
2 supplemented by Publication Notice that will expand the reach of the notice effort
3 even further. See Azari Decl. ¶30. The TCA will provide Epiq with the list of potential
4 Settlement Class Members as well as their postal addresses and email addresses if
5 available.

6 For a small portion of the Class, the TCA does not have names or contact
7 information but rather only their license plate number and/or transponder numbers.
8 This is because these class members have accounts with *other* Toll Roads in California
9 and used their transponder to drive on the TCA's roads.¹⁰ Because TCA has only the
10 transponder number and not the names or contact information for these drivers,
11 publication notice will be utilized. The media campaign will include a print notice in
12 the Los Angeles Times, an informational press release as well as internet notice. Azari
13 Decl. ¶¶18-26. In addition, Epiq will maintain a Settlement Website with detailed
14 information about the Settlements, and a toll-free number that Settlement Class
15 Members can call to obtain more information. *Id.* ¶¶ 27-28. All of the notices, attached
16 as Exhibit B to the Settlement Agreements, are drafted in plain English so they will
17 be easy to understand. They include key information about the Settlements, including
18 the deadline to file a claim, the deadline to request exclusion or object to the
19 Settlements, and the date of the Final Approval Hearing (and that the hearing date may
20

21¹⁰ With respect to Settlement Class members who have accounts with co-defendant
22 OCTA, the parties are requesting that the Court order OCTA and Cofiroute to provide
23 the name and either the last known email address or last known mailing address of
24 such Settlement Class Members (the "OCTA Settlement Class Member
25 Information"). TCA Settlement, ¶ 7.02(a). As explained in Section V, *infra*, the
26 parties also request that, as part of the Preliminary Approval Order, the Court
27 permanently enjoin each and every member of each of the Settlement Classes from
28 filing or pursuing any claim or litigation against any person or entity – including
OCTA and Cofiroute – asserting that compliance with the obligations imposed by the
Preliminary Approval Order and/or the TCA and/or 3M Settlement Agreements
violates California Streets & Highways Code section 31490 or any other federal, state
or local statute, rule, regulation or policy purporting to limit the disclosure of
personally identifiable information.

1 change without further notice). The notices state the maximum percentage for
2 attorneys' fees and the cost awards Class Counsel will request and the amount of the
3 Service Awards Plaintiffs will request.

4 The notices disclose that, by participating in the Settlement, Settlement Class
5 Members give up the right to sue. It also discloses that class member can choose to
6 participate in either, both, or neither of the settlements. The notices direct Settlement
7 Class Members to the Settlement Website for further information, where copies of the
8 notices, the Settlement Agreements, the complaint and answer, and motions and
9 orders relating to the Settlements will be posted. *See* 3M Settlement ¶8.03, TCA
10 Settlement ¶8.03. The notices provide contact information for Class Counsel to answer
11 questions and instructions on how to access the case docket via PACER or in person
12 at any of the court's locations. Settlement Class Members will have 84 days from the
13 date Epiq commences dissemination of notice by sending emails and postcards and
14 publishing the online notices to submit a claim, object to one or both the Settlements,
15 or request exclusion from or both of the Settlements. *See* 3M Settlement ¶¶ 2.14,
16 10.01; TCA Settlement ¶¶ 2.15, 9.01. Epiq will post Class Counsel's motion for
17 attorneys' fees on the Settlement Website at least thirty days before the deadline to
18 object in accordance with *In re Mercury Interactive Corp. Securities Litigation*, 618
19 F.3d 988 (9th Cir. 2010). *See* 3M Settlement ¶ 5.01; TCA Settlement ¶ 4.01.

20 **4. The Claims Process is not Cumbersome**

21 The Claims process is straightforward and employs a tear-off postcard that
22 Class Members can return to receive a cash payment or Class Members may submit a
23 claim form online. The Form is easy to read and may be quickly and easily submitted
24 online. The bulk of the class is self-identified/confirmed through Defendants'
25 computer system so all that most class members will need to do is declare under
26 penalty of perjury that they are entitled to relief.

27

28

1 **5. The Court Should Set Settlement Deadlines and Schedule a**
2 **Fairness Hearing**

3 In connection with preliminary approval, the Court must set a final approval
4 hearing date, dates for mailing the Notices, and deadlines for objecting to the
5 Settlements and filing papers in support of the Settlements. Plaintiffs propose the
6 following schedule, which Plaintiffs believe will provide ample time and opportunity
7 for Class Members to decide whether to participate, request exclusion or object.

EVENT	DATE
Defendants provide notice of the Settlements to the appropriate federal and state officials, as required by the Class Action Fairness Act (CAFA)	Within 10 days of the filing of this Motion.
Notice Date (Date when Notices begin to issue)	91 st day after the Preliminary Approval Order
Deadline to Submit Claim Forms	84 Days from the Notice Date
Deadline to Object to one or both Settlements	84 Days from the Notice Date
Deadline to Request Exclusion from one or both Settlements	84 Days from the Notice Date
Deadline to Submit Motion for Attorneys' Fees, Costs, and Service Awards	14 Days prior to the Objection Deadline
Deadline to Submit Motion for Final Approval	No later than 28 days before the Final Approval Hearing and no earlier than 14 days after the Objection Deadline
Final Approval Hearing	At Least 42 Days after the Objection Deadline

24 **V. ENJOINING SUIT FOR THE PROVISION OF NOTICE**

25 To effectuate the Preliminary Approval Order and to ensure adequate notice is
26 provided to the members of the Settlement Classes, and in accordance with both the
27 Court's general authority to protect its jurisdiction and the All Writs Act (28 USC §
28 1651), Plaintiffs also ask the Court to permanently enjoin each and every member of

1 each of the Settlement Classes from filing or pursuing any claim or litigation against
2 any person or entity asserting that compliance with the obligations imposed by the
3 Preliminary Approval Order and/or the TCA and/or 3M Settlement Agreements
4 violates California Streets & Highways Code section 31490 or any other federal, state
5 or local statute, rule, regulation or policy purporting to limit the disclosure of
6 personally identifiable information. The Parties believe that this is necessary to allow
7 the Defendants to provide contact information to the administrator and not be
8 concerned that a Class Member will bring suit claiming that the provision of their
9 information to the administrator violated §31490. This is a material aspect of the
10 Settlement Agreements executed by the parties. *See* TCA Settlement, ¶ 5.01(f).
11 Issuing such an Order is within the clear authority of the Court to effectuate the
12 proposed Settlements. 28 U.S.C. § 1651; *see also United States v. New York Tel. Co.*,
13 434 U.S. 159, 172 (1977) (“This Court has repeatedly recognized the power of a
14 federal court to issue such commands under the All Writs Act as may be necessary or
15 appropriate to effectuate and prevent the frustration of orders it has previously issued
16 in its exercise of jurisdiction otherwise obtained[.]”); *Keith v. Volpe*, 118 F.3d 1386,
17 1390 (9th Cir. 1997) (“All Writs Act, 28 U.S.C. § 1651, empowers the federal courts
18 to enjoin state proceedings that interfere, derogate, or conflict with federal judgments,
19 orders, or settlements”); *Wright v. Linkus Enterprises, Inc.*, 259 F.R.D. 468, 478 (E.D.
20 Cal. 2009) (enjoining all class members “from commencing actions against
21 Defendants for claims covered by the Settlement Agreement until the Court issues an
22 order at the Final Fairness Hearing on the proposed Settlement Agreement” pursuant
23 to the Court’s authority under 28 U.S.C. § 1651(a)); *cf. Jacobs v. CSAA Inter-Ins.*, No.
24 C07-00362MHP, 2009 WL 1201996, at *2 (N.D. Cal. May 1, 2009) (“The district
25 court has discretion to issue a preliminary injunction where it is necessary and
26 appropriate in aid of the court’s jurisdiction and may enjoin named and absent
27 members who have been given the opportunity to opt out of a class from participating
28 in separate class actions in state court”).

1 **VI. CONCLUSION**

2 Plaintiffs respectfully request that the Motion for Preliminary Approval be
3 granted and the Court enter an Order: (1) certifying the proposed classes for
4 settlement; (2) preliminarily approving the proposed class action settlements; (3)
5 appointing class representatives and class counsel; (4) appointing the notice and
6 settlement administrator; (5) approving the class notice and related settlement
7 administration documents; and (6) approving the proposed class settlement
8 administrative deadlines and procedures, including the proposed final fairness hearing
9 date and procedures regarding objections, exclusions and submitting Claim Forms.

10 Respectfully submitted,

11 Date: November 4, 2020

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1 Pursuant to Local Civil Rule 5-4.3.4(a)(2)(i), the above-listed filing attorney
2 certifies that all other signatories listed, and on whose behalf this filing is submitted,
3 concur in this filing's content and have authorized its filing.

4 Date: November 4, 2020

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